

FOR ARGUMENT

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Supreme Court, U.S.  
**FILED**

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No. 98-10

CLERK

In The  
**Supreme Court of the United States**

October Term, 1998

JEFFERSON COUNTY, ALABAMA,

*Petitioner,*

v.

WILLIAM M. ACKER, JR. and U. W. CLEMON,

*Respondents.*

On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Eleventh Circuit

BRIEF *AMICI CURIAE* BY SEVEN UNITED STATES  
DISTRICT JUDGES OF THE NORTHERN DISTRICT  
OF ALABAMA SUPPORTING RESPONDENTS  
AND SUGGESTING AFFIRMANCE

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### QUESTIONS PRESENTED

1. Whether the district court had subject matter jurisdiction over this action, in light of the Tax Injunction Act, 28 U.S.C. § 1341.

2. Whether a county privilege/occupational tax levied upon the pay or compensation of an Article III judge violates the Supremacy Clause.

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**INTEREST OF AMICI CURIAE<sup>1</sup>**

Judges James H. Hancock, Robert B. Propst, Edwin L. Nelson, Sharon Lovelace Blackburn, C. Lynwood Smith, Jr., Inge Pritt Johnson, and H. Dean Buttram, Jr., who submit this brief *amici curiae*, are Article III judges subject to paying Jefferson County's privilege/occupational license fee based on their pay or compensation for work performed by them in Jefferson County, that is, if Ordinance No. 1120 can be enforced against Article III judges. Contrary to the statement contained in the "stipulated facts" at page 7 of petitioner's brief on the merits, none of *amici*, and, in fact, no Article III judge in the Northern District of Alabama, has paid to Jefferson County any money in response to its demands under Ordinance No. 1120 after the decision by the trial court in favor of Judges Acker and Clemon.

At all times pertinent, Judges Hancock, Propst, Nelson, Blackburn, Johnson and Buttram have had their chambers located in Jefferson County. Judge Nelson's voting residence is in St. Clair County. Judge Johnson's voting residence is in Colbert County. Judge Buttram's voting residence is in Cherokee County. Before taking senior status and moving his chambers from Jefferson

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<sup>1</sup> In compliance with Supreme Court Rule 37.3(a), Jefferson County, Judge Acker and Judge Clemon, constituting all of the parties in this case, have given their written consents to the filing of this *amici* brief. The said consents have been separately filed. As required by Supreme Court Rule 37.6, no counsel for a party has authored this brief in whole or in part, and no person other than an *amici* has made a monetary contribution to the preparation or submission of this brief.

County to Calhoun County, Judge Propst's voting residence was in Calhoun County. Both Judge Smith's voting residence and his primary chambers have at all times pertinent been in Madison County. Judge Smith has secondary chambers in Jefferson County. Judges Propst, Nelson, and Buttram have, since the effective date of Ordinance No. 1120, been assigned to the statutory division of the Northern District of Alabama which sits in Gadsden, a city that has an occupational tax very similar to Ordinance No. 1120, although Gadsden has never sought to enforce its ordinance against any Article III judge who earned income as a result of judicial time spent in Gadsden. The amount of judicial time spent by the seven *amici* in Jefferson County varies between judges and varies by individual judge from year-to-year depending on assignments among the eight federal courthouses in the Northern District, only one of which is located in Jefferson County.

If Judges Acker and Clemon should lose this case on the merits, whether in this court or in a state court upon a remand based on lack of federal jurisdiction, AND if the class certified by an Alabama state trial court in *Richards v. Jefferson County*, 517 U.S. 793 (1996), on remand from this Court, should lose on Jefferson County's present appeal of the recent ruling that Ordinance No. 1120 is unconstitutional across-the-board, each *amici* would owe some undetermined and difficult-to-compute amount of unpaid occupational license fee to Jefferson County, plus penalty.

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### CERTIFICATE OF INTERESTED PERSONS

Jefferson County's list of interested persons is correct as far as it goes. However, it fails to mention *amici*, namely, Judges Hancock, Propst, Nelson, Blackburn, Smith, Johnson and Buttram, all of whom are not only manifestly interested in this case as demonstrated by their statement of interest, *supra*, but some of whom have previously manifested that interest to the extent of filing a brief *amici curiae* in the Court of Appeals for the Eleventh Circuit in support of the positions there taken by Judges Acker and Clemon. All Article III judges, including appellate judges, who have sat or performed judicial functions in Jefferson County since the enactment of Ordinance No. 1120, are interested. Several Article III judges not regularly assigned to the Northern District of Alabama have sat for considerable periods of time in Jefferson County and are therefore exposed to the civil and criminal liabilities of Ordinance No. 1120. Also, clergypersons who earn income from activities in Jefferson County, and who are now being treated by Jefferson County as immune from the effect of Ordinance No. 1120, are interested. If the ordinance is, in fact, an income tax, as Jefferson County and the United States now argue, rather than a privilege or license fee, the constitutional prohibition against a State's licensing of ministers, based upon the First Amendment, as made applicable to the States by the Fourteenth Amendment, would not be implicated, and clergypersons will lose the favorable treatment they now enjoy.

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## STATEMENT OF THE CASE

*Amici* adopt the statements of the case by respondents, Judges Acker and Clemon, by petitioner, Jefferson County, and by *amicus curiae*, United States.

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## SUMMARY OF ARGUMENT

1. In granting *certiorari*, this Court submitted only one jurisdictional issue to the litigants for their comment, namely, what effect, if any, does the Tax Injunction Act have on the federal court's subject matter jurisdiction over this case. *Amici curiae* joins the United States and respondents in submitting that the Tax Injunction Act has no application whatsoever to the procedural facts in this case.
  2. If, as *amici* submit, the federal court does have jurisdiction, Jefferson County's privilege/occupational tax, contained in its Ordinance No. 1120, constitutes a significant burden on Article III judges in contravention of the Supremacy Clause and constitutes a sufficiently discriminatory burden to exempt the ordinance from the exemption which otherwise might be provided by the Public Salary Tax Act.
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## ARGUMENT

- I. **The Tax Injunction Act does not preclude federal court jurisdiction upon removal of these collection actions brought by Jefferson County in state court against Judges Acker and Clemon.**

When this Court granted Jefferson County's petition for a writ of *certiorari*, this Court expressly limited its

grant to two questions. The first of these questions, which if answered in the negative, will obviate the second question, is: "Whether the district court had subject matter jurisdiction over this action, in light of the Tax Injunction Act, 28 U.S.C. § 1341." (emphasis supplied). This Court deliberately did not ask the parties for criticism of or support for the Eleventh Circuit's determination that the removals by Judges Acker and Clemon from state court to federal court pursuant to 28 U.S.C. § 1442(a)(3) were efficacious. This Court asked only that the parties address the effect, if any, of the Tax Injunction Act on the question of the right of Judges Acker and Clemon to remove to federal court.

*Amici* agree with the United States and are grateful for its brief *amicus curiae* when it says, in response to this Court's specific question, that the Tax Injunction Act does not stand in the way of federal jurisdiction over these two consolidated cases, neither of which contained a prayer for declaratory or injunctive relief. *Amici* disagree with Jefferson County on the same subject, but before elaborating on that disagreement, *amici* respectfully point out that the United States in its statement of the issues has conspicuously reframed this Court's carefully framed first query, apparently in order to justify the tangential expression by the United States of its opinion concerning the availability of 28 U.S.C. § 1442(a)(3) as a basis for Judge Acker's and Judge Clemon's removals. While tempted to respond immediately to the non-responsive argument made by the United States about § 1442(a)(3), *amici* will honor the limitation unequivocally imposed by this Court and will assume that this Court is satisfied with what the Eleventh Circuit said respecting § 1442(a)(3).

Starting with *amici's* belief that this Court is already convinced that Judges Acker and Clemon had access to the federal court *unless* precluded by the Tax Injunction Act, *amici* respectfully suggest, as does the United States, that the Tax Injunction Act is not implicated in this case. *Amici* go further and, in response to this Court's unequivocal question, suggest that *if* the Tax Injunction Act is implicated, it does not preclude removal jurisdiction here for the reasons articulated by this Court in *Willingham v. Morgan*, 395 U.S. 402 (1969). There, this Court lucidly explained the reasons why Congress enacted § 1442(a)(1), reasons which apply with equal force to § 1442(a)(3). This Court said in *Willingham*:

The federal officer removal statute is not 'narrow' or 'limited.' *Colorado v. Symes*, 286 U.S. 510, 517, 52 S.Ct. 635, 637, 76 L.Ed. 1253 (1932). At the very least, it is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law. One of the primary purposes of the removal statute – as its history clearly demonstrates – was to have such defenses litigated in the federal courts. The position of the court below would have the anomalous result of allowing removal only when the officers had a clearly sustainable defense. The suit would be removed only to be dismissed. Congress certainly meant more than this when it chose the words 'under color of \* \* \* office.' In fact, *one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court. The officer need not win his case before he can have it removed. In cases like this one, Congress has decided that federal officers, and indeed the Federal Government itself, require the protection of a*

*federal forum. This policy should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1).*

*Willingham v. Morgan*, 395 U.S. 406-407 (1960). (emphasis supplied).

If, contrary to the position now being taken by the United States, § 1341 applies to a case like this one, § 1442 overrides it. The Tax Injunction Act, § 1341, **deprives** federal courts of jurisdiction, whereas the removal statute, § 1442, **grants** federal courts jurisdiction. A universally recognized rule of statutory construction applies here, proving the dominance of § 1442 over § 1341, to the extent the two statutes may conflict. "Statutes which **deprive** courts of jurisdiction are strictly construed . . . On the other hand, a liberal interpretation is accorded statutes purporting to **extend** the jurisdiction of a court." *Sutherland Stat. Const.* § 67.03 (5th Ed. 1992). (emphasis supplied).

Although there was a dissenting view expressed by the Eleventh Circuit in the instant case on the Supremacy Clause question, the Eleventh Circuit was **unanimous** in its belief that it and the trial court had subject matter jurisdiction over this controversy. In other words, the Eleventh Circuit has given a unanimous affirmative answer to this Court's first query. *Amici* respectfully suggest that the unanimous Eleventh Circuit was correct.

When Jefferson County argues that the Tax Injunction Act precludes Judges Acker's and Clemon's access to federal court because the United States, a non party, did not itself join them in the notice of removal, Jefferson County's contention is clearly **contra** to the position of

the United States. However, if by **analogy** to the Tax Injunction Act, there is colorable merit to petitioner's argument that federal courts are precluded from ruling on the constitutionality of a state tax collection effort unless the federal government itself timely intervenes or is the complaining party, *amici* respectfully point out that in the *amicus* brief filed by the United States with the Ninth Circuit in *California Credit Union League v. City of Anaheim*, 95 F.3d 30 (9th Cir. 1996), the United States, which was *not* a party to that case at the time, (1) supported a claim of exemption by a group of federal credit unions from a local tax, said exemption being based on the Supremacy Clause, and (2) did not challenge or even hint at a lack of jurisdiction. The United States began its *amicus* brief in *California Credit Union League* with this pointed sentence: "Federal credit unions are instrumentalities of the United States engaged in the performance of important functions." *Amici* invite this Court to read the entire *amicus* brief of the United States in *California Credit Union League* if the Court has not taken the opportunity to do so.<sup>2</sup> *Amici* hope that the United States and Jefferson County are willing to acknowledge that Article III judges are "instrumentalities of the United States engaged in the performance of important functions." *Amici* would like to think that their functions are as important as those performed by a federal credit union. If so, that should be dispositive of the issue addressed in *Arkansas v. Farm Credit Services of Central Arkansas*, 520 U.S. 821 (1997). In response to a petition for

<sup>2</sup> A copy of the *amicus* brief of the United States in *California Credit Union* has been lodged with the Court.

writ of certiorari in the *California Credit Union League* case, Supreme Court Case No. 96-936, this Court remanded the case to the Ninth Circuit simultaneously with the remand of the instant case to the Eleventh Circuit for reconsideration in light of *Farm Credit Services*, and for the same reason. The position taken by the United States in *California Credit Union League* may or may not be consistent with its position in this case, but it cannot be reconciled with the position Jefferson County takes here.

## II. Jefferson County's privilege/occupational tax levied on the pay or compensation of an Article III judge violates the Supremacy Clause.

The cornerstone argument, both of Jefferson County and of the United States, insofar as the effect of the Supremacy Clause on Ordinance No. 1120 is concerned, is that the ordinance is, in reality, an income tax as to which the United States has waived intergovernmental tax immunity by virtue of the Public Salary Tax Act. In the second limited question put by this Court, it describes Ordinance No. 1120 as a "privilege/occupational tax," using the same descriptive language that Jefferson County uses in the ordinance itself, that never employs, because it cannot, the descriptive term "income tax." Jefferson County and the United States argue that Ordinance No. 1120 is not really what it purports to be, namely, a "privilege/occupational tax", but, instead, an "income tax." There are several flaws in this argument.

First, Alabama categorically forbids a county government from enacting an income tax. Jefferson County

enjoys no exemption from this express state statutory and constitutional prohibition, although it is at this very moment busily engaged in a desperate attempt to obtain the enactment of remedial legislation to correct or replace what a state trial court has found to be an invalid ordinance.<sup>3</sup> Whether Jefferson County's proposed legislation will enable it to enact an "income tax" remains to be seen.

Second, there would be no purpose for the express language in Ordinance No. 1120, which makes "unlawful" an unlicensed activity performed in Jefferson County, if the intent were not to require a person to obtain Jefferson County's formal permission to perform the activity before the person can perform it in Jefferson County. The ordinance has the generally recognized characteristics of a licensing scheme.

Third, a tax which expressly exempts from its effect every person holding a state license authorizing that person to perform an occupation in the state, without regard to how small the state license fee is in comparison to the dollar figure ordered to be paid to Jefferson County, cannot objectively or fairly be viewed as an income tax. Income taxes simply do not exempt vast numbers of taxpayers living and/or working within the taxing jurisdiction.

Fourth, if Ordinance No. 1120 were an income tax, clergypersons would be subject to it. By the terms of this ordinance ministers enjoy no exemption. Under the prohibition of the First Amendment, made applicable to the States by the Fourteenth Amendment, neither the State of

<sup>3</sup> See *The Birmingham News*, January 13, 1999.

Alabama nor Jefferson County can grant or deny a license to preach. Therefore, Jefferson County, by allowing its ministers to be exempt for clear constitutional reasons, is confessing that Ordinance No. 1120 is not an income tax.

Fifth, and finally, income taxes have historically discriminated, if at all, on the basis of the **amount** or **type** of income. In other words, there is nothing unconstitutional about progressive income taxation or exempting certain sources of income. However, Ordinance No. 1120 is not progressive taxation. If, contrary to logic and the English language, this ordinance is an "income tax", it is unique in that it entirely exempts a large portion of the workforce from taxation. Some of the exempted groups generate very sizeable income from work performed in Jefferson County.

Only if Jefferson County has accomplished what the State of Alabama forbids, namely, enacting an "income tax", does this Court reach the question of the applicability of the Public Salary Tax Act, 4 U.S.C. § 111. The Buck Act, 4 U.S.C. §§ 105 *et seq.*, is so clearly inapplicable that *amici* will not discuss it. Apparently the United States, if not Jefferson County, concedes that the Buck Act does not apply.

*Amici* will assume *arguendo* that Congress has the power to waive the intergovernmental tax immunity of an Article III judge despite the Supremacy Clause. To avail itself of any such waiver provided by the Public Salary Tax Act, Jefferson County must demonstrate that its "taxation does not discriminate against [Judges Acker

and Clemon] because of the source of the pay or compensation." 4 U.S.C. § 111. A reading of this statute necessarily leads to a consideration of whether Ordinance No. 1120 "discriminates" against Article III judges.

*Amici* hope that it is clear to the Court that there will be a substantial economic burden placed upon Article III judges if Ordinance No. 1120 is applied to them, not only by making them pay to Jefferson County one-half of a percent of their salaries and other emoluments earned, **no matter whether actually received or not**, for work performed in Jefferson County, but by the time-keeping and reporting requirements arising from the fact that they hold office in a federal court district that includes thirty-one counties. Some of *amici* reside in Jefferson County and some do not. Not only do two *amici* not reside in Jefferson County, but they have their primary chambers in other counties. The mere thought of the onerous requirement of time-keeping and reporting under oath as to the portion of judicial salary attributable to work performed in Jefferson County, leaves Article III judges legitimately feeling uncomfortable and vulnerable, especially when perjury is an impeachable offense.

Kin to, if not identical to, Supremacy Clause immunity, is the general principle stated in *Forrester v. White*, 484 U.S. 219 (1988):

Aware of the salutary effects that the threat of liability can have, however, as well as the undeniable tension between official immunities and the ideal of the rule of law, this Court has been cautious in recognizing claims that government officials should be free of the obligation to answer for their acts in court. Running through

our cases, with fair consistency, is a "functional" approach to immunity questions other than those that have been decided by express constitutional or statutory enactment. Under that approach, we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and **we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions.**

108 S. Ct. 542. (emphasis supplied). This concept was recognized long before *Forrester v. White*. As early as 1872, this Court held that "it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, **without apprehension of personal consequences to himself.**" *Bradley v. Fisher*, 13 Wall. 335, 347, 20 L.Ed. 646 (1872). (emphasis supplied). If Ordinance No. 1120 applies to Article III judges, there is no way to avoid personal consequences for the judges, not the least of which is the decision as to where to hold court.

The United States and Jefferson County argue, of course, that Congress has successfully waived the separation of powers inherent in the Supremacy Clause insofar as Ordinance No. 1120 is concerned, not only because the ordinance is really an "income tax," but because the ordinance does not discriminate against Article III judges. Any time a statute uses the word "discriminate," as 4 U.S.C. § 111 does, a return to the dictionary may be helpful. The word "discriminate" means: "to make a difference in treatment or favor (of one as compared to

others)." This, of course, means that if others are preferred over Article III judges, the judges are the victims of discrimination. Although Ordinance No. 1120 does not *expressly* discriminate against Article III judges, in practical effect it does just that. Discrimination in favor of one group is discrimination against those not in that group. The Jefferson County attorney, who receives a salary almost twice the size of that of a federal district judge,<sup>4</sup> pays no occupational license fee whatsoever under Ordinance No. 1120, because the ordinance exempts lawyers. Instead, he pays \$250 per year to the State of Alabama for his law license. Because *amici* are no longer licensed to practice law, Ordinance No. 1120 purports to require them to pay approximately \$650 per year to Jefferson County unless they are willing to try to reduce that amount by filing a sworn statement saying that they spent a hard-to-prove, specific percent of their quarterly judicial time outside of Jefferson County.

The Public Salary Tax Act is no more than a Congressional confirmation of the right of a State to impose a "general" income tax on federal officials, including judges. This Court noted in *O'Malley v. Woodrough*, 307 U.S. 277, 282 (1939):

To subject them [federal judges] to a *general* tax is merely to recognize that judges are also citizens.

(emphasis supplied). It cannot be argued that Ordinance No. 1120 is a "general" tax. *Amici* and both respondents willingly pay Alabama's general income tax.

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<sup>4</sup> See *Birmingham Post Herald*, January 23, 1999.

The United States in its brief has chosen to believe Jefferson County's claim that Ordinance No. 1120 has no criminal penalties. The oral assurance by Jefferson County that it will never seek criminal penalties for a violation of its ordinance that makes it "unlawful" for *amici* to engage in the occupation of an Article III judge without Jefferson County's license is not enough to relieve *amici* of genuine apprehension and a sense that they are receiving unfair treatment that is grossly unequal in comparison to those many persons who are licensed by the State of Alabama and are therefore not subject to possible arrest for engaging in their occupations in Jefferson County.

In final analysis, Ordinance No. 1120 discriminates among occupations. Article III judges are among the occupations discriminated against. The fact that other occupations are also discriminated against does not alter the fact that Article III judges are discriminated against. They do not have to be the specific, named targets of unequal treatment to be eliminated from the waiver contained in the Public Salary Tax Act.

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## CONCLUSION

*Amici* respectfully ask this court to affirm both the Eleventh Circuit's holding that the district court had jurisdiction and its holding that Ordinance No. 1120 is unconstitutional as applied to Article III judges. Alternatively, if this Court does not agree that Ordinance No. 1120 is unconstitutional as applied, *amici* respectfully

suggests that this case should be remanded to the Eleventh Circuit to obtain its opinion on the diminution of compensation question which the trial court addressed but which the Eleventh Circuit did not address.

Respectfully submitted,

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